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Division III  
State of Washington  
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**NO. 36742-8-III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

**VINCENTE BUENO,**

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Kevin S. Naught, Judge

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**BRIEF OF APPELLANT**

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### **A. ASSIGNMENTS OF ERROR**

1. Defense counsel's failure to object to the jury receiving Bueno's extensive criminal history through unredacted certified copies of judgment and sentences admitted as trial exhibits denied Bueno his constitutional guarantee of effective assistance of counsel.

2. The inclusion of Bueno's juvenile conviction for second-degree burglary erroneously listed as an adult offense in Bueno's criminal history is a scrivener's error that should be corrected.

### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether defense counsel, in failing to object to Bueno's inadmissible criminal history being submitted to the jury as evidence via otherwise admissible judgment and sentences denied Bueno his right to effective assistance of counsel?

2. Whether the trial court erred in including a scrivener's error, mischaracterizing a juvenile offense as an adult conviction, in. Bueno's judgment and sentence?

### **C. STATEMENT OF THE CASE**

By a second amended information, the state charged Vincente<sup>1</sup> Bueno with two crimes: felony violation of a protection order by violating a protection order after having two previous convictions for court order violations (count one), and for violating the protection order by committing an assault on Lydia Hinojosa the person protected by the order (count two). CP 1-2. RCW 26.50.110(5); RCW 9A.36.041(4).

A jury heard the evidence in the case. RP1<sup>2</sup>, RP5.

Linda Vasquez worked as an assistant manager at Topp Stop in Toppenish. RP1 323-24.

Topp Stop is a busy gas station and convenience store. RP1 259, 335. On July 17, 2018, Vasquez focused on her many duties, which included supervising two other employees, ringing up patrons at the cash

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<sup>1</sup> Bueno's first name is spelled in the record sometimes as "Vicente" and other times "Vincente." Counsel uses "Vincente" in her writing of the Brief of Appellant.

<sup>2</sup> Two transcriptionists prepared the verbatim record. "RP1" refers to the first electronic volume prepared by Joan E. Anderson. "Volume 1" appears on the cover page. "RP5" refers to the second volume prepared by Anderson. "Volume V" appears on the cover page. Transcriptionist Amy Brittingham prepared a separate volume of verbatim. Her volume is referenced as "RP Post-trial."

register, receiving stock from vendors, and maintaining business records in the store's office. RP1 324-25, 348-49, 353, 361-62, 364.

On July 17, 2018, Vasquez's day at the store started early. She came on shift about 3 a.m. RP1 334-35.

One of the other employees Vasquez supervised that morning was Lydia Hinojosa. RP1 324.

A few hours into the morning, Vasquez noticed Bueno, a person she knew through Hinojosa, looking into the store through a window on the side of the building. RP1 324-325. At the time, Hinojosa was stocking shelves and talking to a male customer about getting a tattoo. RP1 327. Bueno came into the store. RP1 327. Vasquez thought he looked upset. RP1 327. Bueno walked over to Hinojosa, grabbed her by the waist, and talked to her. RP1 327.

Bueno and the male customer left the store. RP1 328. A few minutes later, Bueno came back to the store and asked Hinojosa to come outside with him. RP1 329. They went out together. RP1 329. Hinojosa came back inside after a few minutes and returned to stocking shelves. RP1 336.

About an hour later, Bueno returned to the store and asked Hinojosa to come outside. RP1 330-31. Vasquez read Bueno's expression

to mean he was upset. RP1 330. Hinojosa went outside. A few minutes later, Hinojosa hurried back into the store and told Vasquez to call the police as “the mother-F hit me.” RP1 330. Vasquez called 911. RP1 331. Vasquez left the store to try and get a license plate number but was unsuccessful. RP1 331. Vasquez thought Bueno drove a Cadillac. RP1 360.

Vasquez saw that Hinojosa’s work-issued uniform t-shirt appeared torn. RP1 330. Hinojosa held the t-shirt against herself. RP1 330. Vasquez noticed the gold chain Hinojosa always wore around her neck was gone. Vasquez and Hinojosa looked for the gold chain but did not find it. RP1 331.

Toppenish Police Officer Danillo Hawkins arrived at the store to investigate. RP1 250-51.

Officer Hawkins observed Hinojosa’s work uniform t-shirt to be “pulled out and not in order.” RP1 256. He also noted shallow red scratches on her front. RP1 255, 257.

Officer Hawkins conducted an abbreviated investigation. He talked briefly to Hinojosa and Vasquez, but he did not talk to the other employees on shift about their observations. RP1 255-58,281. He did not attempt to gather information from customers in the store or customers outside using the gas pumps. RP1 281. He did not collect any recordings

made at the time by the store's recorded surveillance system. RP1 258, 374-75. He took no pictures of Hinojosa. RP1 259.

Hinojosa did not appear or testify at trial.

Officer Hawkins is familiar with Bueno. RP1 252. He identified Bueno as the person on trial. RP1 252.

Officer Hawkins identified Hinojosa as the person depicted in a Department of Licensing photo admitted as a trial exhibit. RP1 253. She was the person he talked to at Topp Stop. RP1 253-55.

Vasquez was the only Topp Stop employee to testify at trial. RP1 322-432.

At trial, Vasquez looked at Bueno sitting with defense counsel and identified him as the person who interacted with Hinojosa in the store. RP1 324. Bueno impeached Vasquez's identification of him. She failed to recognize his distinctive characteristics when identifying him in an out-of-court process. RP1 417-24. Out of court, Vasquez did not mention Bueno's multiple large tattoos on his neck and forearms, the distinctive large Superman ring he always wore on his hand, and his prominent "Jay Leno chin," and the scant hair on his head. RP1 417-20, 545.

Bueno's counsel anticipated Bueno would enter a stipulation to having two prior domestic violence no contact order convictions in lieu of

the state presenting proof of the violations. RP1 240-41, 285. The two prior convictions elevate a no contact order violation from a misdemeanor to a felony. CP 1, 10.

Bueno, however, decided not to stipulate to his prior no-contact order convictions. RP1 370-71. Instead, to prove the prior convictions, the state admitted exhibits 1 and 4, certified copies of prior felony convictions for violating domestic violence no contact orders. RP1 442, 444. Supplemental Designation of Clerk's Papers, DCP, Exhibits 1, 4.

Yakima Sheriff's Office fingerprint technician Sonya Banks testified to having compared a fingerprint card with Bueno's name on it to the fingerprints on the two admitted judgment and sentences, Exhibits 1 and 4. RP1 437,442, 444. Banks opined the fingerprints on the print card and the judgment and sentences were all for the same person, Vincente Bueno. RP1 448-503.

The court admitted exhibits 1 and 4 without any redaction. RP1 441-45. Significantly, no one moved to redact the exhibits to delete Bueno's extensive, varied, and irrelevant criminal history. RP1 441-45. Exhibit 1, page 2; Exhibit 4, pages 2-3. As such, Bueno's extensive criminal history was on full display for the jury's review during deliberation. Exhibit 1, page 2; Exhibit 4, page 2-3.

2.3 Criminal History: Prior criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	Adult or Juvenile	Type of Crime*
Violation NCO – DV 14-1-00322-0	2/12/2015	Benton, WA	3/7/2014	Adult	NV DV
Posses w/intent to Deliver - Meth 14-1-00664-6	9/12/2014	Yakima, WA	5/7/2014	Adult	Drugs
Possess of CS – 13-1-01277-0	4/22/2014	Yakima, WA	9/2/2013	Adult	Drugs
Second Degree Burglary 12-1-00377-2	5/15/2012	Yakima, WA	3/7/2012	Adult	NV
Second Degree Burglary 08-1-00995-1	6/7/2008	Yakima, WA	5/4/2008	Adult	NV
Second Degree Burglary 04-8-01989-4	1/19/2005	Yakima, WA	11/8/2004	Adult	NV
<b>Non Felony DV Convictions</b>					
Violation of Protection Order 40494	11/6/2012	Yakima, WA	9/5/2012	Adult	GM
Malicious Mischief 3 – DV 4Z1065443	1/8/2015	Yakima, WA	11/29/2014	Adult	GM

Exhibit 1, page 2.

Bueno’s defense challenged Vasquez’s identification of him as the person who interacted with Hinojosa. RP2 541-52. Bueno presented evidence from defense investigator James Keightley. RP2 508. Keightley took photos of Buena’s tattoos, Superman ring, chin, and hair to impeach Vasquez and undermine her out-of-court identification of Bueno. RP2 508-20, 541-52.

Bueno did not testify. RP2 504-05.

No one challenged the error of sending Bueno's extensive criminal history via the unredacted judgment and sentences – Exhibits 1 and 4 – to the jury.

The jury found Bueno guilty as charged. CP 19, 20. The jury also found by special verdict that Bueno and Hinojosa were members of the same family or household. CP 21, 22.

At sentencing, the parties agreed Bueno's sentence was both a minimum and a maximum of 60 months. RP 4/12/19 at 5-6; CP 24. The judgment and sentence mistakenly lists Bueno's juvenile second-degree burglary conviction, No. 04-8-00995-1 as an adult offense. CP 24.

Bueno appeals all portions of his judgment and sentence. CP 31.

#### **D. ARGUMENT**

**Issue 1: Defense counsel failed to act as constitutionally guaranteed counsel by failing to object to Bueno's irrelevant and highly prejudicial criminal history being provided to the jury via unredacted judgment and sentences admitted as exhibits.**

- a. The state and federal constitutions guarantee Bueno effective counsel at trial.**

The Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution guarantee the right to effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22;

*Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Anderson*, 9 Wn. App. 2nd 430, 447 P.3d 176, 188 (2019); *State v. Barbarosh*, \_\_ Wn. App. \_\_, 448 P.3d 74, 78 (2019).

Defense counsel's ineffectiveness is proven when the defendant shows, on appeal "that (1) his counsel's performance fell below an objective standard of reasonableness and (2) that counsel's poor work prejudiced him." *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

An allegation of ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Kylo*, 166 Wn.2d at 862. Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

- b. Defense counsel's failure to object to the admission of Bueno's lengthy, highly incriminating, and irrelevant criminal history via two unredacted judgment and sentences sent to the jury denied Bueno effective assistance of counsel.**

There is no conceivable legitimate tactic, from a defense perspective, in allowing the jury to have a list of the defendant's extensive criminal history to review during deliberation.

For the charges of felony violation of a court order, an element of the crime was that, at the time of the violation, the defendant had twice been previously convicted for violating the provisions of a court order. RCW 26.50.110(5); CP 194-95 (element four in “to-convict” instructions); see *State v. Oster*, 147 Wn.2d 141, 143, 52 P.3d 26 (2002).

As Bueno chose not to stipulate to his prior convictions, providing proof of the prior convictions fell to the state. The state submitted certified copies of Bueno’s convictions for felony violation of a protection order – domestic violence (exhibit 1) and for felony violation of a protection order (exhibit 4). Both prior judgment and sentences were necessary proof of Bueno’s specific prior convictions as related to the charges but the remainder of the criminal history was gratuitous, irrelevant and highly prejudicial information about Bueno, namely his extensive criminal history. Exhibits 1 and 4.

Counsel performs deficiently by failing to object to the inadmissible criminal history, admitted as evidence, absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Defense counsel’s failure to object to the jury receiving Bueno’s highly incriminating

and completely irrelevant criminal history denied Bueno effective assistance of counsel.

Both judgment and sentences went back for the jury's deliberation without redaction. Both detailed Bueno's extensive criminal history.

There is no record of the parties asking the court to review the content of the otherwise admissible history prior to admitting them as exhibits for the jury's full review. Had the court done so, it would have at the very least ordered redaction and perhaps complete removal of any reference to Bueno's criminal history. It was as simple as removing the one page from both of the admitted judgment and sentences.

For the deficiency prong of ineffective assistance of counsel, this court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. *State v. West*, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015). Deficient performance is performance that fell below an objective standard of reasonableness based on consideration of all the circumstances. *McFarland*, 127 Wn.2d at 334-35. The appellant bears the burden to prove ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 335.

Effective representation entails certain basic duties, such as the overarching duty to advocate the defendant's cause and the more

particular duty to assert such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland*, 466 U.S. 668; *In re Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 100, 351 P.3d 138 (2015).

The defendant must show in the record the absence of a legitimate strategic or tactical reason supporting the challenged conduct or omission by counsel. *McFarland*, 127 Wn.2d at 336.

It is likely a reversible error to admit evidence about prior convictions, “unless that evidence pertained to another element of the crime and unless the trial judge properly found that the probative value of such evidence outweighed its significant prejudicial effect.” *State v. Case*, 187 Wn.2d 85, 90, 384 P.3d 1140 (2016), as amended (Jan. 19, 2017); *State v. Nguyen*, \_\_ Wn. App. \_\_, 450 P.3d 630, 644–45 (2019).

Additionally, “Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial.” *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

Decisions on whether and when to object to trial testimony are classic examples of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Only in egregious circumstances, on testimony central to the state’s case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Johnston*, 143 Wn.

App. 1, 19, 177 P.3d 1127 (2007). Counsel engages in a legitimate trial tactic when foregoing an objection in circumstances when counsel wishes to avoid highlighting certain evidence. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). When a defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must show that the objection would likely have succeeded. *State v. Gerdtz*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). In this case, of course the court would have omitted the irrelevant and highly prejudicial criminal history.

Not all defense counsel's strategies or tactics are immune from attack. *In re Personal Restraint of Caldellis*, 187 Wn.2d 127, 141, 385 P.3d 135 (2016). A criminal defendant can rebut the presumption of reasonable performance by demonstrating that no conceivable legitimate tactic explains counsel's performance. *Caldellis*, 187 Wn.2d at 141; *Reichenbach*, 153 Wn.2d at 130. The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Saunders*, 91 Wn. App. at 578.

Evidence of a prior conviction poses a great risk of unfair prejudice against a defendant. *Old Chief v. United States*, 519 U.S. 172, 180-81, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997); *Johnson*, 90 Wn. App. at 63. It is particularly prejudicial when the crime at issue is similar to the one being tried or when the evidence would provoke an emotional response. *Old Chief*, 519 U.S. at 185; *Johnson*, 90 Wn. App. at 62.

Because Bueno declined to stipulate to his prior no contact order convictions, the judgment and sentences for two prior convictions were necessary to prove the elements of the offense, and their admission in the state's case was appropriate. But the admission of the exhibits in total, with Bueno's extensive criminal history on full display, was unnecessary and prejudicial. The failure to redact the criminal history denied Bueno a fair trial. A fair trial could only be had with Bueno's incriminating criminal history deleted through redaction. *See Nguyen*, \_\_. Wn. App \_\_, 450 P.3d at 645.

Judgment and sentences are admissible for proof in instances where a prior conviction is an element of proof in the current offense. ER

901(7). Here, without a stipulation of convictions to meet the two prior violation element, proof of those prior convictions was admissible. But that does not mean the entire judgment and sentence is admissible, especially if certain parts are irrelevant and highly prejudicial. The court recognized the likelihood of prejudice when, pre-trial, it stated "If Mr. Bueno does not testify, the state is not going to be allowed to bring up any prior criminal history other than the no contact order violations." RP1 223.

Here, admission of redacted judgment and sentences was appropriate as proof of the prior convictions. But the complete criminal history should have been redacted. It was very prejudicial. A reasonable defense attorney would have objected. *Id.* Bueno's lawyer provided deficient performance by failing to protect his client from the irrelevant, highly-prejudicial evidence. *Saunders*, 91 Wn. App. at 578.

There was certainly no tactical reason for Bueno's otherwise inadmissible extensive criminal history to be on full display for the jury for as long as they wanted to look at it in the jury room. There was no tactical reason to want the criminal history to go into evidence. There was no tactical reason to fail to object to the admission of otherwise irrelevant criminal history.

The jury already knew about the two prior no contact order convictions in Benton County and Yakima County – through exhibits. But during deliberation, they would also learn, irrelevantly, many other things about Bueno.

The jury learned Bueno has a history of being a drug dealer based on his 2015 conviction for possessing methamphetamine with intent to deliver. Exhibit 4.

The jury learned, in addition to being a drug dealer, Bueno was a drug user based on his 2014 possession of a controlled substance conviction. Given Bueno's later conviction for methamphetamine possession with intent to deliver, the jury could reasonably infer that Bueno's substance of choice was methamphetamine. Methamphetamine is often associated with irrational and violent behavior and might, in the jury's mind, be associated with the state wanting to preclude Bueno from contact with Hinojosa.

The jury learned too that Bueno is a serial burglar with convictions in 2005, 2008, and 2012.

The jury also learned that Bueno had two non-felony violations to add to his criminal behavior via a violation of a protection order in 2012

and a domestic violence malicious mischief (destruction of property) in 2015.

All of this criminal history likely told the jury Bueno had no compunction against committing crimes and would not be stopped by a mere no contact order. This history certainly augmented Vasquez's weak testimony on her identification of Bueno. It in fact adds a whole layer of evidence that the court, the state, and defense counsel failed to realize was given to the jury to factor into their opinion of Bueno and their decision on the case. The criminal history put Bueno in the jury's mind in a way no testimony reflected. Bueno's criminal history gave the jury an entirely different perspective on Bueno.

None of the otherwise inadmissible criminal history evidence was relevant to whether Bueno appeared at Topp Stop on July 17, 2018 or assaulted Hinojosa at Topp Stop. But it certainly factored into what the jury thought of Bueno. And other than the two prior felony no contact order convictions, it was entirely irrelevant and would not have been admitted for any reason had it been sought to be admitted.

Given the admission of Bueno's lengthy irrelevant criminal history, it is no surprise the jury convicted Bueno even with Vasquez's questionable identification of Bueno.

Counsel's failure to screen the jury from seeing the whole of Bueno's irrelevant criminal history fell below an objective standard of reasonableness. And it was prejudicial. Thus, there is a reasonable probability that defense counsel's failure to object affected the outcome of Bueno's trial. *Kyllo*, 166 Wn.2d at 862.

Counsel's failure to move to strike Bueno's criminal history from the otherwise admissible judgment and sentences deprived Bueno his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* Bueno's convictions for felony violation of a no contact order must be reversed, and the charges remanded for dismissal. *Id.*

**Issue 2: A scrivener's error on the criminal history portion of Bueno's judgment and sentence requires remand for correction.**

Scrivener's errors are clerical errors resulting from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). A scrivener's error is one that, when amended, would correctly convey the intention of the trial court, as expressed in the record at trial. *State v. Priest*, 100 Wn. App. 451, 456, 997 P.2d 452 (2000); *see also Presidential Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).

CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative or the motion of any party. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016).

There is one scrivener's error on Bueno's judgment and sentence. The criminal history section incorrectly references a juvenile second degree burglary conviction as an adult offense. CP 24. See No. 04-8-01989-4. Offenses referenced as an "8" are juvenile convictions. The offense is listed as having occurred on November 8, 2004. CP 24. Bueno's date of birth is May 10, 1987. CP 23. In November 2004, Bueno was 17 years old.

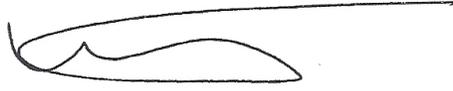
The offense with its incorrect "8" characterization (04-8-0189-4) should be remanded to reflect a juvenile offense rather than the adult characterization listed on the judgment and sentence. RP 24.

#### **E. CONCLUSION**

The error in admitting Bueno's extensive criminal history in the unredacted judgment and sentences admitted as evidence requires Bueno's convictions be reversed.

In the alternative, this court should remand Bueno's case to correct the characterization of Bueno's 2004 juvenile second degree burglary as an adult conviction in Bueno's criminal history.

Respectfully submitted December 16, 2019.

A handwritten signature in black ink, consisting of a long horizontal stroke followed by a loop and a smaller flourish below it.

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LISA E. TABBUT/WSBA 21344  
Attorney for Vincente Bueno

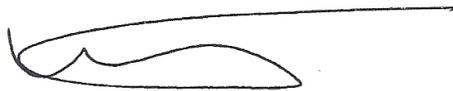
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Yakima County Prosecutor's Office, at [appeals@co.yakima.wa.us](mailto:appeals@co.yakima.wa.us); (2) the Court of Appeals, Division III; and (3) I mailed it to Vincente Bueno/DOC#374701, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 16, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Vincente Bueno, Appellant

**LAW OFFICE OF LISA E TABBUT**

**December 16, 2019 - 10:07 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36742-8  
**Appellate Court Case Title:** State of Washington v. Vincente Salcedo Bueno  
**Superior Court Case Number:** 18-1-01396-3

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